INDEX

	Page
Statement	1
Argument	6
Conclusion	13

CITATIONS

Cases:

Atlantic Coast Line R. Co. v. *United States*, 284 U.S. 288 ..... 7, 9, 10, 11
Atlantic Coast Line R. Co. v. *United States*, 48 F. 2d 239 ..... 11, 12
Atlantic Coast Line R. R. Co. v. *United States*, 205 F. Supp. 360, aff'd 371 U.S. 6 ..... 12, 13
A. T. & S. Railroad v. *D. & N. O. Railroad*, 110 U.S. 667 8
Canadian Pacific Railway Company v. *United States*, 158 F. Supp. 248 13
Chicago, I. & L. Ry. Co. v. *United States*, 270 U.S. 667 ..... 11, 12
Little Rock & M. R. Co. v. *St. Louis I. M. & S. Ry. Co.*, 41 F. 559, appeal dis. 149 U.S. 779 8
Louisville & Nash. R. Co. v. *United States*, 238 U.S. 1 12
Routing Restrictions Over Seatrain Lines, Inc., 296 I.C.C. 767 8
Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 13
Thompson v. *United States*, 343 U.S. 549 ..... 7, 9, 11
Western Pacific R. Co. v. *Camas Prairie R. Co.*, 316 I.C.C. 795 2

Statutes:

Interstate Commerce Act, 49 U.S.C. § 1 et seq.

Section 1(4) 2, 3, 4, 6, 8, 9
Section 3(4) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12
Section 5(2) 13
Section 15(3) 8, 9, 11

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 598

THE WESTERN PACIFIC RAILROAD COMPANY, ET. AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

On Appeal from the United States District Court for the Northern District of California, Southern Division

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MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the Interstate Commerce Commission moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment (J.S. 36a) of a three-judge district court dismissing appellants' [1]

[1] The Western Pacific Railroad Company and its short line subsidiaries.

suit to set aside an order of the Interstate Commerce Commission. The order of the Commission (J.S. 31a), entered in *Western Pacific R. Co.* v. *Camas Prairie R. Co.*, 316 I.C.C. 795, dismissed Western Pacific's complaint against the failure and refusal of the Northern Pacific Railway Company and Union Pacific Railroad Company [2] to establish through routes and joint rates with Western Pacific through Portland, Oregon, on traffic moving between points in California, on the one hand, and points in Oregon, Washington, and Idaho, on the other. Western Pacific alleged that the failure to establish such through routes and joint rates, on the same basis as such routes and rates are maintained in connection with the Southern Pacific through Portland, is unjust and unreasonable in violation of 49 U.S.C. § 1(4) and discriminatory in violation of 49 U.S.C. § 3(4).

The Southern Pacific Company maintains a line running, in general, from the Los Angeles area north through the San Francisco Bay area to Portland, where it connects with the lines of the Northern Pacific, Union Pacific and Great Northern which extend north and east in Oregon, Washington and Idaho. Through routes and joint rates between California points and points in the Oregon-Washington-Idaho area have been maintained by these carriers via Portland for over 50 years. For over 30 years, competition with this Southern Pacific route has been

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[2] Although the complaint ran against other railroads (See J.S. 8a, note 2), the Northern Pacific and Union Pacific were the principal defendants.

supplied by the so-called Bieber route. The Bieber route consists, in general, of through routes and joint rates over the Atchison, Topeka and Santa Fe's line from the Los Angeles area north to the San Francisco Bay area; then the Western Pacific's line north to Bieber, California; then the Great Northern's line north to Wishram, Washington, and on to destination—either west through Vancouver and Portland or east through Pasco and Spokane, Washington.[3] Thus the Western Pacific and Great Northern, through their participation in the Bieber route, are strong competitors of the carriers participating in the Southern Pacific route. The Northern Pacific and Union Pacific, which connect with the Great Northern at Portland, and, therefore, could enter into through routes and joint rates via Portland with the carrier members of the competing Bieber route, have (with isolated and minor exceptions) steadfastly attempted to keep such routes commercially closed from the inception of the Bieber route over 30 years ago.

Western Pacific's complaint proceeded to hearing before an examiner of the Commission on both the Section 1(4) and 3(4) issues.[4] In his report and recommended order, the examiner took the position that he need not reach the Section 1(4) issue of whether the Commission should order the establishment of

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[3] See map facing J.S. 4. For detailed statements of these routes and rates see J.S. 9a-12a, and 20a-21a.

[4] Santa Fe and Great Northern answered the complaint with expressions of willingness to establish and maintain the routes and rates sought. Southern Pacific intervened in opposition to the complaint.

through routes via Portland between the Bieber route carriers and Union Pacific and Northern Pacific, because Western Pacific primarily argued, and he found, a Section 3(4) violation (J.S. 6a-7a). His finding of a Section 3(4) discrimination in rates apparently rested on a finding of "connecting line" status for Western Pacific on the basis of a few joint through rates via Portland on specific commodities (J.S. 5a-6a).

On exceptions, the Commission, Division 2, reversed the examiner. The Commission noted that, although Western Pacific then indicated a willingness to rely alone on the alleged violation of Section 3(4), it had not withdrawn its Section 1(4) allegations nor its request for the prescription of through routes, a remedy related to a Section 1(4), rather than a Section 3(4), violation (J.S. 29a). Accordingly, the Commission ruled on both issues.

The Commission found that the record did not support a finding "that the public interest would be served by requiring the establishment of joint rates and through routes which are substantially slower and costlier than the present routes" (J.S. 30a). Therefore, the Commission held that the refusal of the defendant railroads to enter into such through routes and joint rates, with Western Pacific via Bieber and Portland was not a violation of Section 1(4).

On the Section 3(4) issue, the Commission found Western Pacific was not a "connecting carrier" with the defendant carriers at Portland within the meaning of that term as used in Section 3(4) and, there-

fore, was not entitled to here invoke that section (J.S. 29a). This conclusion was reached after a lengthy review of the law and the facts (J.S. 26a-29a). It rests upon the application to the facts of a definition of "connecting lines" employing alternative criteria—*i.e.*, physical connection or business connection. First, Western Pacific does not physically connect with the defendant carriers at Portland since its northern terminus is at Bieber, California, some 490 miles south of Portland (J.S. 10a, 26a). Second, absent physical connection, Western Pacific could still be a "connecting line" if through routes with defendants via Bieber and Portland exist. But the record shows no such through routes exist (J.S. 28a-29a).[5]

Additionally, the Commission found that even if Western Pacific were a connecting line within the meaning of Section 3(4), the evidence of record did not establish the similarity of circumstances and conditions which would justify, and under Section 3(4) require, equality of treatment (J.S. 29a).

In the court below, Western Pacific did not challenge the Commission's finding that the 30 year failure to establish through routes and joint rates with

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[5] This was the point of departure between the examiner's opinion and the Commission's. The examiner concluded joint through rates on a few specified commodities rendered unjustified the refusal to establish joint through rates generally. The Commission, following well-settled precedents, concluded that such limited incidents do not establish through routes generally and, thus, the carriers are not connecting lines. Cf. J.S. 6a-7a and 27a-29a.

Western Pacific via Bieber and Portland was not shown to be unjust or unreasonable under Section 1(4) (J.S. 33a, n.3). Western Pacific only sought review of the Section 3(4) ruling. The three-judge district court unanimously sustained that ruling by confirming the Commission's finding that Western Pacific was not a "connecting line" within the meaning and protection of Section 3(4). (J.S. 36a). The court rejected Western Pacific's arguments that the definition of connecting lines should be extended beyond that employed by the Commission, holding: "This court is satisfied that the present definition fully comports with the statutory purpose, and that any further expansion of the term is not warranted." (J.S. 36a).

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court:

1. Section 3(4) of the Interstate Commerce Act provides that railroads "shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any [railroad] or any common carrier by water subject to part III." Western Pacific contends that it is a "connecting line" with the Union Pacific and Northern Pacific at Portland within the meaning of Section 3(4), although Western Pacific is 490 miles short of a physical connection with those railroads at Port-

land, and although it does not have a through route business connection with them (in conjunction with the intervening Great Northern) at Portland. Western Pacific rests this contention upon the theory that "connecting lines" as used in Section 3(4) includes the middle links of successive lines of railroads which could form a through route to the point of alleged discrimination. The concept that such a possible "route" is an entity entitled to protection under Section 3(4) is stated by Western Pacific as "that single-route, multi-line, end-to-end operations which provide all of the services of paralleling lines [must] be protected against discriminatory treatment" (J.S. 9). We submit that this novel theory was rejected correctly by Division 2 of the Commission, by a 10 to 1 vote of the entire Commission, and by the unanimous court below.

In 1932 this Court made it clear that a connecting line is one which has either a direct physical connection at the common interchange or is one which makes up a "through route" through the interchange point. *Atlantic Coast R. Co.* v. *United States*, 284 U.S. 288, 293 (1932). The test of the existence of a "through route" was later stated by this Court to be whether the participating carriers hold themselves out as offering through transportation service. *Thompson* v. *United States*, 343 U.S. 549, 557 (1952). Both the Commission and the court below relied upon these definitions (J.S. 26a-27a, 35a-36a).

Nothing in the language or history of Section 3(4) supports a further broadening of the concept of "connecting lines". On its face Section 3(4) refers to

"connecting lines" rather than to possible routes embracing distant carriers. Moreover, Section 3(4) must be read with the through route and rate provisions of Sections 1(4) and 15(3) of the Act.

Section 1(4) requires railroads "to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto." If a railroad refuses to do so, the Commission may require it to do so under the authority of Section 15(3), "whenever deemed by [the Commission] to be necessary or desirable in the public interest." But, the Commission has long recognized that enactment of these statutory provisions in no way changed the common law right[6] of a railroad to refuse to join in a particular through route, a business relationship, so long as that refusal does not violate some law or the through route is not otherwise proven "necessary or desirable in the public interest". *Cf., Routing Restrictions Over Seatrain Lines, Inc.*, 296 I.C.C. 767, 774 (1955).

As compared with the carriers' obligations, and the Commission's authority, inherent in the statutory scheme of Sections 1(4) and 15(3), the pertinent provision of Section 3(4) is much narrower in scope. Section 3(4) does not speak of "routes," but only of "rates." It is specifically limited to "connecting lines" whereas Section 1(4) is not. And, it is specifically

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[6] See, *e.g., A. T. & S. Railroad* v. *D. & N. O. Railroad*, 110 U.S. 667, 685 (1884); *Little Rock & M. R. Co.* v. *St. Louis I. M. & S. Ry. Co.*, 41 F. 559 (E.D. Ark., 1890), appeal dismissed 149 U.S. 779 (1893).

aimed at "discrimination between" such connecting lines as to rates. Thus, it assumes as a condition precedent the existence of the connection (physical or business) which Sections 1(4) and 15(3) aim at establishing.

Appellants originally sought relief under Sections 1(4) and 15(3), as well as 3(4). They failed to prove their Section 1(4) case and abandoned it. Their attempt to expand the definition of connecting lines in Section 3(4) to cover the factual situation here present is clearly a misinterpretation of that section to be a proper tool to force open new through routes with other railroads in the absence of a demonstrated public need for such through routes as required by Sections 1(4) and 15(3). Section 3(4) has no such purpose. Accepting appellants' expanded definition of connecting lines would confer broad powers upon the Commission, never intended by Congress, to order the opening of through routes without regard to the present limitations on such powers in paragraphs (3) and (4) of Section 15. For this reason, as the court below noted (J.S. 36a), the definition of connecting lines given by this Court in *Atlantic Coast Line*, *supra*, and applied here by the Commission, "fully comports with the statutory purpose," whereas appellants' attempt to expand that definition "is not warranted."

In the light of the foregoing, appellants' attempt to distinguish the *Atlantic Coast Line* and *Thompson* cases, and their reliance on other decisions, are meaningless; for it is the compatibility of the definition employed—that of the Commission and the court be-

low or that of appellants—with the statutory scheme which is the real issue here.[7] Even so, the cases discussed by appellants afford them no support.

Despite appellants' assertions (J.S. 12-13), *Atlantic Coast Line R. Co.* v. *United States, supra,* is not distinguishable[8] from this case and does not support appellants, because the "through route" to which the Court referred is not, despite appellants claim (J.S. 13), comparable to the Beiber route south of Portland. Rather, since it included the Clinchfield, it was comparable to the through route *through* Portland which would have here existed, but does not, if the Union Pacific and Northern Pacific had held themselves out (as did the Clinchfield) to participate in such an arrangement with the Beiber route carriers. Because the lessors of the Clinchfield were required by the conditions of the lease to join in through routes and joint rates with all carriers connecting with the Clinchfield, or which might later connect with it, without discrimination, between the territory north and west of the Clinchfield's northern terminus and the southeastern territory beyond its southern terminus, there was the very holding out of through routes with complainant *through the interchange point*

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[7] The failure to recognize this to be the real issue is also apparent in the Memorandum for the United States to this Court.

[8] Appellants attempt to distinguish this case on the basis that the Court was not construing Section 3(4) but, rather, the terms of a lease (J.S. 12). The Commission correctly recognized this to be a distinction without a difference since the principle involved was identical (J.S. 26a).

which is missing here.[9] It was an attempt to cancel that through route, of which the complainant was a part (while continuing a through route with complainant's competitor), which was the issue in *Atlantic Coast Line*. This holding out of a through route through the common point of interchange is what the Court directed its definition of "connecting lines" to and is why that definition does apply here in the way relied upon by the Commission and the court below.

Appellants argue that the definition of a "through route" in the *Thompson* case "has no logical relationship" here (because Thompson was not a Section 3(4) question) and that its use results in a "complete anomoly." (J.S. 14). But, the Court was there defining the term as used "throughout the Interstate Commerce Act" [10] and appellants cite no authority, nor give any logical reason, for use of a different definition in the test of what is a connecting line under Section 3(4). The alleged anomalous result from employing that definition is nothing more than the prevention of appellants' use of Section 3(4) as an unlimited weapon to force open through routes in place of the limited power to do so accorded the Commission in Section 15(3).

Finally, appellants' reliance upon *Chicago, I. & L. Ry. Co.* v. *United States*, 270 U.S. 287 (1926), as "controlling here" (J.S. 11), is misplaced, as the court

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[9] 284 U.S. at 292-3. See the more detailed statement of the lower court, *Atlantic Coast Line R. Co.* v. *United States*, 48 F. 2d 239, 240 (W.D. S.C., 1931).

[10] 343 U.S. at 556.

below found (J.S. 36a). If, as appellants argue (J.S. 12), that decision ever stood for the proposition that (absent physical connection) a through route was unnecessary to establish connecting line status under Section 3(4), it has been replaced by the later *Atlantic Coast Line* decision. But, it has never stood for any such proposition. As the court below noted (J.S. 36a), the *Chicago, I. & L.* case presented no question of connecting line status under Section 3(4) and, moreover, as a reciprocal switching case, it is totally inapplicable here. *Louisville & Nash. R. Co.* v. *United States*, 238 U.S. 1, 18 (1915); *Atlantic Coast Line R. R. Co.* v. *United States*, 205 F. Supp. 360, 365 (M.D. Ga., 1962), *aff'd.* 371 U.S. 6 (1962).

2. We submit that the sole issue involved in this case (at least as resolved by the Commission and the court below) is not of general importance. It involves competitive relationships between railroads—rather than the interests of the shipping public which are protected under other provisions of the Act. So far as we are aware, no other railroad (or water common carrier) has contended that it is a "connecting line" within the meaning of Section 3(4) in the absence of a physical or business connection within the meaning of *Atlantic Coast Line R. Co.* v. *United States, supra.* Certainly, the appellants' vague references to proposed mergers and other developments in the railroad industry (J.S. 8-9, 18) fail to demonstrate that "The importance of this case to the tranportation industry can hardly be overstated" (J.S. 7). Rather, in approving a railroad consolidation under

Section 5(2) of the Act, the Commission has ample power to protect the public interest by imposing conditions for the maintenance of existing routes and the establishment of new routes. *Atlantic Coast Line, supra*; *Canadian Pacific Railway Company* v. *United States*, 158 F. Supp. 248, 254 (D. Minn. 1958); *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line*, 320 I.C.C. 122, 180-188 (1963).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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NOVEMBER, 1964

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 736083 415